

To: The CJA Panel Members
From: The CJA Committee for the
Eastern District of New York
Dated: May 13, 2014

**GOOD PRACTICE SUGGESTIONS
for EDNY CJA Panel Attorneys**

In an effort to provide CJA Panel members with suggestions for increasing efficiency and maximizing the productive use of time, the CJA Committee¹ has prepared the following list of Good Practice Suggestions. Many of the suggestions and tips will be familiar to Panel members; others may be new. Perhaps most important is the change in the rules for travel reimbursement.

A. *Travel Vouchers*

The CJA Guidelines, Section 230.76, provides that “[v]ouchers should be submitted no later than 45 days after the final disposition of the case, unless good cause is shown.” When submitting the voucher outside the 45-day time period, counsel is required to provide an affidavit setting forth good cause. See Second Circuit Judicial Council Committee on Criminal Justice Act Representation Policy and Procedure Manual, I.A.1.c. (Dec. 17, 2013).

Counsel who anticipate being unable to submit their CJA voucher within the 45-day time

¹The CJA Committee extends special thanks to the subcommittee comprised of Peter Kircheimer, Gary Villanueva, and Louis Freeman, who, with the assistance of Jerry Tritz and Anthony L. Ricco, developed the suggested practices list. Also, the Honorable Dora L. Irizarry worked with the Warden of the MDC in an effort to clarify and improve the procedures to be followed by attorneys when visiting their clients.

limit are directed to submit an affidavit to the presiding judge, prior to the expiration of the 45-day limit, setting forth their reasons for the late filing, and requesting an extension of time.

An attorney who fails to submit the voucher or a timely request for extension within the 45-day limit runs the risk of not being paid for the representation.

B. *Travel Smart*

1. New Travel Reimbursement Rules.

a. Reimbursable Travel Expenses: When visiting detainees, CJA counsel is permitted to bill for travel expenses from his or her home or office to the detention facility – whichever distance is shorter. Counsel may also bill for travel expenses on the return trip to home, office or the court. See The Guide to Judiciary Policy, Volume 7, Part A, Chapter 2 (Appointment & Payment of Counsel) for information about travel expenses for CJA attorneys.

b. Non-reimbursable Travel Expenses: Counsel ordinarily may not bill for travel time to and from his or her home or office to court; nor may counsel seek reimbursement for the return trip from court to home or office. Exception: The exception to this rule applies when an attorney, who is only on the Brooklyn CJA Panel, is specially assigned to a case pending in Central Islip. Provided counsel first obtains permission from the presiding district judge on the case, counsel may seek reimbursement for travel to and from home or the office to the Central Islip Courthouse. The same exception applies when attorneys only on the Long Island Panel are assigned to a Brooklyn case and need to travel to the Brooklyn courthouse, and the presiding judge approves such reimbursement in advance.

c. Vouchers: CJA vouchers seeking reimbursement for travel expenses

must specify where the travel is to and from. Vouchers that fail to contain this information will be returned to the requesting attorney.

2. Travel Suggestions.

a. When traveling long distances to see a client with an interpreter, try to see more than one client using that interpreter. Remember that interpreters are permitted to bill for travel time within a 25 mile radius of the metropolitan area.

b. When traveling out of the New York metropolitan area or to a foreign nation in a case where an interpreter is required, arrange for an interpreter in the location. Contact your CJA Representative or the Federal Defenders of New York (“F.D. of N.Y.”) for assistance to identify an interpreter.

c. When purchasing air travel tickets, book your travel through the National Travel Agency whenever possible. If you are certain of the date(s) upon which you will be traveling, request *nonrefundable tickets*. *Nonrefundable tickets* are always substantially less expensive than *refundable tickets*. However, if the date of departure for travel is not certain or there is a possibility that you will have to move the date of departure and/or the return date, always purchase *refundable tickets*.

C. ***Investigators, Experts, Paralegals, and Associates***

Under the CJA Plan, counsel for a party who is financially unable to obtain investigative, expert, social worker, or other services deemed necessary for an adequate defense may request such services *ex parte* before a judicial officer having jurisdiction over the case. Similarly, the use of associates is authorized under the CJA Plan and the Guide to Judiciary Policy, but the

associate shall be considered as an extension of, and not a substitute for, the Panel attorney.

1. Experts, Investigators and Paralegals.

Panel attorneys seeking to use an investigator, expert or paralegal are encouraged to seek authorization from the presiding judicial officer *prior* to retaining such services. Although the CJA Plan provides that such services may be obtained without prior judicial authorization, subject to certain maximum amounts authorized by statute, the better practice is to first obtain permission from the court. In any event, applications for such services must be supported by an affidavit, which must be as specific as possible in describing the need for the service, the number of estimated hours necessary to the preparation and presentation of your defense, the estimated cost, and include a curriculum vitae for the investigative expert or paralegal.

2. Negotiate and Shop Around for Service Providers

a. Shop Around for the Best Prices: For example, where there are multiple mental health experts charging different rates, select the expert with the lowest rate, assuming that the expert has an excellent reputation and record. Counsel should never compromise the quality of the service provided, but is encouraged to shop around and negotiate for the best rates.

b. Negotiate Rates: Counsel should negotiate and inquire whether a service provider will work or provide services at a lower rate in CJA cases - where possible. Many service providers in the past have done so as a result of an expressed professional public interest in our cases.

c. Step by Step or Gradual Approach to Contracting Services: For example,

if counsel has several tape recordings in need of voice analysis at a rate of \$3,500 per tape, have the analysis done one tape at a time. After reviewing the results on the first tape, consult with the client and then decide whether any further analysis needs to be done on any of the remaining tapes.

d. Translations: Asking a contracting interpreter to prepare summaries rather than verbatim translations may help you decide whether verbatim translations are necessary.

e. Translation of a single phone call: When seeking a translation of a single phone call, negotiate an hourly rate rather than a half day rate, and have the interpreter participate by conference call. The F.D. of N.Y. tries to pay \$75.00 - \$100.00 an hour where the interpreter does not need to leave home to do the translation.

Counsel should read and become familiar with the Second Circuit CJA Policy and Procedure Manual issued by the Second Circuit Judicial Counsel Committee. Presumptive rates for expert service providers are set forth in Appendix E of the Second Circuit CJA Policy and Procedure Manual. (http://www.ca2.uscourts.gov/CJA_policy_manual.htm)

Counsel has discretion and makes the ultimate decision on the rate to be submitted to the court for prior approval of payment for service providers, such as investigators, paralegals and other experts. However, when retaining the services of a provider, establish a compensation rate consistent with the presumptive rate schedule in the CJA Policy and Procedure Manual wherever possible, as well as commensurate with the experience and level of expertise of the services provided. Prior to submitting a request for expert services to the court, counsel may consult with Jerry Tritz, the Case-Budgeting Attorney, for guidance on the prevailing going

rates@ for expert service providers.

Finally, the CJA Plan requires that any application submitted for prior approval should include an affidavit containing: 1) the name, address, telephone number and taxpayer identification number or social security number of the expert, investigator, or other service provider; 2) the hourly rate sought; 3) the estimated number of hours to complete the work; 4) justification for the use of the expert, investigator or other service provider; and 5) a properly prepared CJA Form 21 or 31 for the judicial officer=s approval. Although the number of hours vary based upon the needs of the individual case, counsel should maintain consistency on requested billing rates for service providers from case to case.

3. Associates.

a. Prior Approval is Required: Please be aware that unlike experts, prior approval of the use of associates must be obtained from the presiding judicial officer. This will allow the court to consider the qualifications of the associate, including educational background and experience, and to rule upon the necessity of the associate=s participation. In the absence of prior judicial approval, reimbursement for an associate=s time under the CJA shall, except for good cause shown, be denied by the presiding judicial officer.

b. Rates of Reimbursement: Associates may be billed at the rates set forth in the then current Second Circuit Manual, regardless of the nature of the case, including capital cases. Associates are to be used as “of counsel” and not as paralegals. If the presiding judge believes that an associate has been used as a paralegal and not as an associate, the hourly rate may be adjusted accordingly.

D. *Visiting Clients in Jail*

1. Arrive Early.

When making jail visits during the week, arrive at the detention facilities early in the morning (8:30 a.m. to 9:00 a.m.) to avoid conflict with and delays caused by the processing of social and family visits, which begin at noon. Alternatively, visit the jail on the weekend when there are no social visits.

2. Visit Multiple Clients.

Visit more than one client when visiting the detention facilities - where possible. If visiting a cooperator, consider whether such a visit is appropriate. In any event, make sure to coordinate with other lawyers where there are separation orders in place.

a. When visiting clients at the MDC always bring extra files for the opposite wing you are planning to visit, so that if the client you are seeing has been transferred to the other wing, you are still able to call on multiple clients.

b. As long as there are no separation issues, the MDC has agreed to allow corrections officers to bring down more than one inmate at a time. Counsel may request to see three clients at once so that by the time you finish with the first client, the others will be available to interview. If the desk officer is unaware of this policy, ask to speak to the Duty Lieutenant. Obviously, this does not apply to inmates who are in the Special Housing Unit (ASHU@) who must be seen within the confines of the SHU visiting area. This will eliminate a substantial amount of waiting time between interviews.

c. Bring materials to review on other cases while waiting at the local jails - where practical.

3. Notice to Clients.

Let clients know of your visit ahead of time. The MDC will be keeping a log concerning attorney visits in order to address claims that the corrections officers are not producing defendants timely or at all. Attorneys should advise their clients that they have limited time to visit and impress upon them the importance of going down to see the attorney as soon as they are summoned. In addition, attorneys should coordinate visits with family members so that the client is not forced to choose who she or he actually sees.

4. Title 18 Forms.

Attorneys and their paralegals and interpreters will be permitted to fill out their Title 18 forms (certifying that they are not bringing firearms or other contraband into the facility) in advance, as opposed to once they get to the facility. The CJA Committee is working with the Warden of the MDC to facilitate access to these Title 18 forms.

5. Identify Yourself as an Attorney.

Attorneys should be permitted to get to the front of the line when there are family members and others visiting inmates. The attorney should identify him/herself to the corrections officer in the visiting area upon entering. The Warden should be made aware if these procedures are not being followed.

6. Paralegals.

Send a paralegal to the prison only if you do not need to discuss substantive legal issues with your client and you only need to get a document signed.

Defendants should be accompanied by counsel and not by paralegals at any pre-sentence interview with the Probation Department.

7. MDC Medical Unit.

The MDC Medical Unit is concededly understaffed. When a defendant is going to enter the facility and she or he is on prescribed medications, the MDC Legal and Medical Staff recommend the following:

a. Prescription Medications: The defendant should bring his medication in a bottle that has a prescription label on it, with his or her name, the name of the prescribing physician, the name and strength of the medication, and the name or phone number of the pharmacy that filled the prescription. This will assure continuity of medication and, if it is not on the BOP formulary, will allow the intake medical staff to find a proper substitute.

Moreover, this will avoid any delay in obtaining medical treatment. Judges should be asked to make sure that the Marshals accept such medication. Note that the defendant may NOT bring bottles of *expired* medications or medications without proper labels.

b. Medical and Psychiatric Records: The MDC medical staff highly recommends that the defendant bring with him or her copies of their medical/psychiatric records, especially the names and telephone numbers of any treating physicians. Getting an inmate proper medical treatment may be delayed if the inmate does not know the names of the medications he or she is taking, the ailments he or she has, the names of the treating physicians, or at which hospitals he or she has had procedures. This delay is made even worse if there is a language barrier. It can take medical staff months to track down this information.

E. ***Transcripts***

1. Ordering Transcripts.

Do not order transcripts automatically. Instead, consider whether there is an actual need or not.

2. Free Access to Pacer.

CJA Attorneys may apply to the court for free access to Pacer on their CJA cases. Once given access, attorneys have free access to the entire docket, including the transcript of the plea allocution before the magistrate judge, which is always transcribed for review, and acceptance of the plea by the presiding district judge. There is a 90-day blocked period for review of errors and correction of the transcript. During the 90-day blocked period, the transcripts can be viewed by the attorneys, but not printed, from the public terminals in the Clerk's Office. Once that period is over, the transcript may be downloaded for free. However, the CJA attorney first must apply for the free access.

3. Sentencing Transcripts.

Rather than requesting payment for sentencing transcripts, wait until the end of the 90-day period when the transcripts are posted on ECF and can be printed without cost. If the CJA Attorney has not applied for free access to Pacer, it will still be cheaper to order the transcript after the 90-day period at \$0.10 per page rather than at the \$0.90 per page that is charged before that period ends.

4. The Guide to Judicial Policy.

Vol. 6, Ch. 5 of the Guide to Judicial Policy governs all matters concerning transcripts.

Section 510.45.20(b) provides:

The Congress and the Judicial Conference have insisted that the requirements of 28 U.S.C. ' 753 as to the transcribing or recording of pleas and sentences in criminal cases be carefully and promptly observed. The reporter must file a transcript within 30 days of *the close of the*

proceeding unless it was recorded on electronic sound recording equipment, in which event the electronic recording, accompanied by a certification of the reporter, must be filed as soon as the recording has been used to capacity.

' 510.45.20(b) (emphasis added). We interpret *at the close of the proceeding* to refer to the end of the arraignment, change of plea hearing, or sentencing hearing, and not the end of the case.

Section 510.45.20(c) cautions the court to carefully consider whether the Clerk's copy (which is the copy posted per the provision of subsection(b) set forth above) is sufficient, before approving production of another copy at government expense in connection with 28 U.S.C. ' 2255 motions.

Court reporters are permitted to post an electronic recording of proceedings in a special file maintained by the Clerk's office in order to satisfy the statutory requirements. However, these files are not accessible to the court or the parties. The Judicial Policy Guidelines make it clear that only a certified transcript is appropriate for use in other court proceedings (such as habeas petitions). The presiding judge can direct the court reporter to post a transcript within 30 days of the end of the proceeding (arraignment, guilty plea, or sentence) to satisfy the policies set forth above. This option then permits the attorneys to employ the cost saving measures described in the earlier part of this memorandum. In addition, if the presiding judge directs such action, then, automatically, the transcripts become readily available for any appeal or post-conviction proceedings, again at the cheaper costs described above.²

²Notably, as part of their regular salary, court reporters are compensated for transcripts of arraignments, change of plea hearings, and sentences.

The CJA Committee is recommending that an Administrative Order of the Court be issued directing all court reporters to post transcripts of arraignments, guilty pleas, and sentences within 30 days of the date of each proceeding. Thus, the court reporters will be alerted to the fact that they are required to complete and post said transcripts, even if the presiding judge does not specifically order them to do so. Additionally, for purposes of appeal, appellate counsel, instead of ordering the transcript at a higher cost, can advise the Circuit Court that, by Administrative Order of the U.S. District Court of the EDNY, the transcript has been or will be posted by (date) and will be ordered at the reduced CJA or Federal Defenders Office rate.

5. Sharing Transcripts.

Court stenographers may only charge once for CJA ordered transcripts. If one CJA attorney in a multi-defendant case has ordered a transcript, the other attorneys must share with that attorney rather than submitting a voucher and ordering an additional copy. CJA Attorneys should not share transcripts with those who are not on the CJA Panel. The Judge on the case should allocate expenses between Panel and non-Panel attorneys. If the government or retained counsel has ordered a transcript at the regular delivery rate (\$4.02 per page for 30-day delivery), or the court has ordered it, then CJA counsel may order a copy at \$0.90 per page. (These rates are not for transcripts that have already been posted on the docket as per section D.2 above). Once a party has ordered a transcript, the court reporter is required to post the transcript on the docket.

F. ***Practical Suggestions***

1. Billing for Reviewing E.C.F. Bounces.

Counsel should refrain from billing for the review of routine or informational ECF bounces, unless substantive action related to the review of the ECF bounces is required.

2. Use of Mail Delivery Services.

When mailing documents and pleadings, use the regular United States Postal Service. Counsel should refrain from using FedEx or UPS for mailing everyday correspondence or materials. If you need proof of service or tracking of your mailed item, use the United States Postal Service's Priority Mail.

3. Legal Research.

Counsel may submit a request in advance to be compensated on an hourly basis for legal research performed through electronic research services, such as Lexis or Westlaw. You will not be compensated for the actual cost of your Lexis or Westlaw research; you will only receive compensation for your time.

G. ***Multi-Defendant Cases***

1. Discovery Review in Major Multi-Defendant Cases.

Utilize lower cost providers such as paralegal and/or associate counsel (with prior Court approval) for discovery review and indexing in cases involving large volumes of Rule 16 discovery.

2. Prevent the Duplication of Work in Multi-Defendant Cases.

Share the costs of Title III motions, and other suppression motions related to more than one defendant with co-counsel where possible *B* i.e. motions related to the execution of search warrants impacting more than one defendant. Circulate the joint submission to all counsel

ahead of time, with the option that any counsel may submit a supplemental declaration which raises an issue particular to his or her defendant. Request permission of the presiding judge to follow this procedure.

3. Counsel Meetings in Multi-Defendant Cases.

Counsel without conflicts are encouraged to meet in multi-defendant cases to discuss the coordination of discovery, motions, and case budgeting.

4. Discovery in Multi-Defendant Cases.

Counsel are encouraged to utilize the services of the National Litigation Support Resources in cases where Rule 16 discovery is provided in digital or electronic format. Contact Kelley Scribner (510-637-1952) and/or Sean Broderick (510-637-1950) at the Office of Defender Services. They will help organize and index computer generated Rule 16 discovery.

5. Share Service Providers.

In multi-defendant cases, counsel is encouraged to share service providers where there is no conflict of interest. For example, in a multi-defendant case, an investigator can interview a government witness and get the basic pedigree information for the benefit of all defendants.

H. ***Case Budgeting***

1. Prepare a Budget.

On any case which has the capacity to exceed \$30,000 or require more than 300 attorney hours, you should prepare a budget. Contact Jerry Tritz (212-857-8726) for advice and assistance.

2. Use case budgeting techniques even on non-budget cases.

Utilizing case budgeting techniques will help to improve the efficiency in all cases, including those involving less than \$30,000 or fewer than 300 attorney hours.

I. ***Continuing Legal Education and Training***

CJA counsel is encouraged to keep track of and attend CLE training sessions and programs sponsored by the Training Branch of the Office of Defender Services, the District Courts for the Eastern and Southern Districts of New York, the Federal Defenders of New York, the United States Sentencing Commission, and the local Bar Associations on the federal sentencing guidelines, the federal rules of evidence and on federal substantive and procedural law.

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The above good practices are being provided to assist CJA counsel with cost saving measures to utilize during this period of fiscal crisis and to clarify existing rules and procedures. Implementation of these practices is intended to enhance the quality of representation afforded to CJA clients by their assigned attorneys.